IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 15600 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Petitioner(s)

Versus

SUBURBHAI HUMALABHAI MALI C/O.GUJARAT RAJYA GOVT. - Respondent(s)

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Appearance :

GOVERNMENT PLEADER for Petitioner(s) : 1,
MR BJ TRIVEDI for Respondent(s) : 1,
MR JT TRIVEDI for Respondent(s) : 1,
MS JIGNASA B TRIVEDI for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 29/09/2005

ORAL JUDGMENT

1. This petition has been filed by the State Government challenging legality of an award dated 26th May, 2004

passed by Labour Court, Godhra. By the impugned award the reference of the respondent workman was allowed in part. He was ordered to be reinstated in service with 50% back wages.

2. The respondent who was engaged as a Guard by the Forest Department challenged his termination dated 15/11/2000 by raising an Industrial Dispute being Reference (LCG) No. 813/2001.

3. Before the Labour Court the petitioner filed a written statement to the statement of claim filed by the workman. In the written statement it was specifically contended that the Forest Department is discharging the duties of protecting the wild life, birds etc. living in the forest which duty is cast upon the department under Article 48 of the Constitution of India. It was contented that looking to the activity being carried out by the department, it is a Governmental function and is discharging duties of general public good. It was, therefore, contended that the employer is not covered under the definition of Industry. This question was requested to be decided as a preliminary issue. It was contended that it is necessary to decide as a preliminary

issue whether the employer is covered by the definition of Industry as defined under the Industrial Disputes Act. In the impugned award also the Labour Court noted this contention raised on behalf of the petitioner. It was noted that in the reply statement Exh. 9 the petitioner contented that it is not covered under the term 'Industry' as defined under the Industrial Disputes Act, and that, therefore, reference of the workman is not maintainable. Despite this specific stand of the petitioner and the objection raised to the maintainability of the reference the Labour Court proceeded further by passing the award in favour of the workman without even deciding the issue. In the entire award of the Labour Court, I find no discussion or conclusion with respect to the question whether the petitioner was an industry and whether the workman was engaged in such an activity which would have qualified as being an industry within the meaning of Industrial Disputes Act. In the impugned award there is neither any discussion nor any conclusion with respect to the objection raised by the petitioner about the maintainability of the reference and the power of the Labour Court to grant any relief to the workman. It can thus be seen that the entire issue whether the petitioner

was an industry or not and whether the workman was engaged in such an activity which would have qualified within the meaning of industry in Industrial Disputes Act remained undecided. In my view, Labour Court clearly erred in allowing the reference without first deciding whether the respondent was engaged in an industry or not. Without any conclusion on this question, the Labour Court lacked jurisdiction to entertain the reference and to allow the same.

3.1 In a Full Bench decision of this Court in the case **Gujarat Forest Producers, Gatherers and Forest Workers Union vs. State of Gujarat reported in 2004 (2) GLH 302**, it has been held that the entire Forest Department cannot be branded as an industry and only those units which satisfy the triple test laid down in the decision of the Hon'ble Supreme Court in the Bangalore Water Supply case can be covered under the definition of term industry. It can thus be seen that entire Forest Department has not been held as industry and it has be examined in an individual case whether the employee was engaged in such an activity which would clarify for being held as an industry within the meaning of Industrial Disputes Act. Without any discussion or conclusion on this issue,

Labour Court could not have further entertained the reference and allowed it also.

4. Learned advocate Shri Trivedi appearing for the respondent workman urged that the petitioner had not produced any material before the Labour Court to establish that it is not an industry. It was contended that witnesses were examined on behalf of the respondent who had not given any evidence to establish that the petitioner is not an industry and that the respondent was not engaged in such an activity which can be termed as an industry. When the petitioner in no uncertain terms asserted before the Labour Court that the respondent was not engaged as an industry, it was the duty of the Labour Court to decide such a question not necessarily as a preliminary issue though before reference could have been allowed. In the present case as noted earlier Labour Court gave no conclusion. It was the duty of the petitioner to urge before the Labour Court at the first available opportunity that respondent is not engaged as an industry if that was the stand of the petitioner. Having done that it was the duty of the workman to establish before the Labour Court that he was engaged in an industry. As noted earlier by Full Bench decision in

the case of Gujarat Forest Producers, Gatheres and Forest Workers Union (supra) it is not as if the entire Forest Department is an industry and only those activities which fulfill the triple test laid down by the Hon'ble Supreme Court in the Bangalore Water Supply case can be covered under the said term. Workman has not led any evidence whatsoever to suggest as to in what activity he was engaged, as to the nature of the activities being carried out by his employer and the reasons why such activities would fulfill the triple test. Learned advocate Shri Trivedi has produced on record the deposition of the workman as well as the witness examined by the petitioner. There was no material on record to establish that the workman was engaged in an industry. There was no discussion by the Labour Court or conclusion that respondent was engaged in an industry. In that view of the matter, the award of the Labour Court cannot be sustained. Since the award was passed in favour of the workman without examining the question whether he was engaged in an industry or not the case calls for a remand permitting both the sides to produce such further evidence as they desire. It will be the duty of the Labour Court to examine additional material that may be produced on record and to come to a specific conclusion

whether respondent was employed in an industry or not.

5. In view of the above discussion, I do not find that the decision relied upon by the learned advocate Shri Trivedi would help the present situation. Reliance was placed on the decision of State of **Gujarat vs. Dahyabhai Mutabhai Vankar dated 7th February, 2000 passed in Special Civil Application No. 15009/99 in Letters Patent Appeal No. 1668/99**. In the said decision Division Bench of this Court was pleased to reject an application for delay condonation filed by the State Government in filing Letters Patent Appeal, finding that no sufficient cause was found by the State Government. I see no application of the above mentioned decision in facts of the present case.

5.1 Reliance was placed on a decision dated 23rd February, 2000 passed by learned Single Judge of this Court in case of State of **Gujarat vs.Shermohmed Janmohmed in Special Civil Application No. 1025/2000**. Basing reliance on the said decision, it was contended that this Court cannot re-appreciate evidence in a petition under Article 227 of the Constitution of India while examining legality of the award passed by the Labour Court. The

said decision also has no application since I find that in the present case Labour Court allowed reference of the workman without deciding, despite objection from the petitioner, whether the employee was engaged in an industry or not.

5.2 In the decision of Gujarat Forest Porducers, Gatherers and Forest Workers Union (supra) Full Bench of this Court had observed that question whether the department of the Government as an industry cannot be allowed to be raised for the first time before the High Court if not raised before the industrial forum. In the present case however as noted earlier the petitioner had at the very outset raised the question that the respondent was not employed in an industry. In that view of the matter despite resistance from the learned advocate for the respondent, I am of the opinion that the proceedings are required to be remanded for fresh consideration.

6. Learned advocate Shri Trivedi also submitted that even while remanding the matter this Court should provide for reinstatement of the workman. He placed reliance on an order dated 18th September, 1998, passed by learned

Single Judge of this Court in **Special Civil Application No. 1048/98 between Gujarat Agricultural University and A.I.Pathan**. In the said decision the learned Single Judge however, found that the petitioner university which had challenged the award passed by the Labour Court had not produced any material before the Labour Court to establish that the workman had worked only for 147 days in two years. It was in that back ground that the learned Judge observed that the university cannot be made to suffer on account of lapse on part of its officers in placing the record before the Labour Court while remanding the matter. The learned Judge was pleased to provide that the respondent will be permitted to join duty during the pendency of the reference. In the present case however, it is not on account of any failure on the part of the petitioner to produce documents that the earlier order has been passed. The proceeding is being remanded back in the interest of justice to permit both sides to establish their claim before the Labour Court when the Labour Court had allowed the reference without deciding the question whether the respondent was engaged in an industry or not. Analogy of the above mentioned order of learned Single Judge of this Court cannot be adopted in the present case.

7. In the result, petition is allowed in part. Impugned award of the Labour Court is set aside. Proceedings are remanded for fresh consideration after permitting both sides to lead further evidence. Labour Court should decide the reference afresh including deciding the question whether respondent was engaged in an industry or not. Labour Court is requested to expedite the proceedings and endevour to dispose the same within a period of six months from the date of receipt of a copy of this order. With these directions, petition is disposed of. Rule is made absolute to the limited extent. No order as to costs.

8. Direct Service is permitted.

(Akil Kureshi, J.)

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